

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER JOHN BERNAICHE,

Defendant-Appellant.

UNPUBLISHED

April 25, 2006

No. 255081

Wayne Circuit Court

LC No. 03-001733-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

CHRISTOPHER JOHN BERNAICHE,

Defendant-Appellee/Cross-
Appellant.

No. 261498

Wayne Circuit Court

LC No. 03-001733

Before: Cooper, P.J., and Jansen and Markey, JJ

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree premeditated murder, MCL 750.316(1)(a); three counts of assault with intent to commit murder, MCL 750.83; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the first-degree murder and assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right in Docket No. 255081.

After defendant filed his claim of appeal, the trial court granted defendant's motion for a new trial on the ground that the prosecution failed to comply with its duty to supplement disclosure under MCR 6.201. The trial court retains jurisdiction to grant a motion for a new trial if timely filed, even where a claim of appeal is also filed. MCR 7.208. The prosecutor appeals the order granting a new trial by leave granted in Docket No. 261498.

We affirm the trial court's order granting defendant's motion for a new trial, and remand for further proceedings.

I. Facts and Proceedings

Defendant's convictions arise from a December 27, 2002, altercation in which he fatally shot two people and wounded three others. At trial, defendant presented a defense of involuntary intoxication causing legal insanity, claiming his conduct was caused by the effects of the antidepressant drug Prozac. Defendant began taking Prozac approximately two months before the events at issue, and his physician had doubled his dosage just a few days before the incident.

At trial, defendant presented Dr. Peter Breggin as an expert witness to support his defense that his violent behavior was caused by the effects of Prozac. Dr. Breggin testified that he specializes in clinical psychopharmacology, the study of how psychiatric drugs affect patients. Dr. Breggin indicated that he had substantial experience testifying at trials involving psychiatric drugs, including selective serotonin reuptake inhibitor (SSRI) drugs, the class of drugs that includes Prozac. Dr. Breggin testified that the Prozac drug defendant was taking both stimulated and depressed defendant, leaving him susceptible to uncontrollable violent urges which prevented defendant from conforming his behavior to the requirements of the law. Dr. Breggin explained that defendant displayed the symptoms of mania and akathisia while on Prozac, which were precursors to the violent episode.¹

The prosecutor relied on two experts, Dr. Philip Margolis, a psychiatrist employed by the Wayne County Jail, and Dr. Stephen Norris, a psychologist employed by the Center for Forensic Psychiatry, to rebut defendant's insanity defense. Drs. Margolis and Norris did not give testimony that directly contradicted Dr. Breggin's theory that Prozac may cause some individuals to become aggressive and violent, but both opined that defendant was not legally insane while on Prozac because he maintained the capacity to appreciate the wrongfulness of his actions and to conform his actions to the requirement of the law.

Dr. Margolis evaluated defendant on December 8, 2003, and prepared a report, dated December 23, 2003. The report indicated Dr. Margolis had reviewed materials on SSRI-induced violence, but rather than addressing the disorder generally, the report focused on defendant individually. Basing his opinion on the inconsistencies between SSRI-induced violence and defendant's behavior, impressions from jail staff of defendant's behavior, defendant's history of substance abuse and anger, defendant's recent personal difficulties, and defendant's behavior on the night of the shooting, Dr. Margolis concluded that defendant was able to control his behavior on the night of the shootings.

Dr. Margolis later prepared a second report ("supplemental report"), which he faxed to the prosecutor on January 12, 2004. The supplemental report summarized Dr. Margolis's review of published research on the link between SSRI use and aggressive and violent behavior, and

¹ Mania causes a person to feel very important and intolerant of anything that irritates him, and akathisia is a feeling of restlessness and an urge to be in constant motion.

reported that a small minority of patients treated with SSRI experience stimulating side effects² that might lead to aggressive or violent behavior. However, Dr. Margolis concluded that defendant did not exhibit any of these symptoms and that his behavior could therefore not be attributed to Prozac.

The prosecutor failed to disclose the supplemental report to defendant. Only after defendant's expert witness, Dr. Breggin, had completed his testimony and left the state did defense counsel discover the existence of Dr. Margolis's supplemental report. The defense being therefore not reasonably situated to evaluate, rebut, or respond to the report, defendant sought to exclude Dr. Margolis's testimony entirely, arguing the prosecutor had failed to meet his obligation to disclose the report under MCR 6.201 and MCL 768.20a. The trial court agreed that the supplemental report should have been disclosed, but decided that the appropriate remedy was to limit Dr. Margolis's testimony to his original report rather than excluding it entirely. The prosecution filed a motion for immediate reconsideration of this limitation of Dr. Margolis's testimony, and defendant in response reiterated the request that the expert's testimony be stricken in its entirety. The trial court denied both motions. After defendant was convicted, he moved for a new trial on several grounds, including the prosecutor's failure to disclose the supplemental report. The trial court agreed that the remedy applied during trial had been inadequate to redress the harm to defendant, and ordered a new trial.

II. Docket No. 261498

We first consider the prosecutor's appeal in Docket No. 261498. At issue is whether the prosecutor was obligated to disclose Dr. Margolis's supplemental report to defendant, and, if so, whether the trial court properly awarded defendant a new trial because the report was not disclosed. We find that the prosecutor was obligated to disclose the report, and that the trial court was within its discretion in ordering a new trial to redress the discovery violation.

The construction and application of court rules is a question of law that this Court reviews de novo on appeal. See *People v Fosnaugh*, 248 Mich App 444, 449; 639 NW2d 587 (2001). Likewise, the question of whether material is privileged under the work-product doctrine is a question of law subject to de novo review. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). However, a trial court's remedy for a discovery violation is reviewed for an abuse of discretion. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

Discovery in criminal actions is governed by MCR 6.201, which provides that a party "must provide" "any report of any kind produced by or for an expert witness whom the party intends to call at trial." And the duty is both ongoing and self-executing: "If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." MCR 6.201(H).

Defendant argues that Dr. Margolis's supplemental report was a report produced by an expert witness whom the prosecutor intended to call at trial. The prosecutor argues that the

² Mania, hypomania (a milder form of mania), and/or akathisia.

supplemental report was nondiscoverable work-product only. We agree with the trial court that the broad language in MCR 6.201(A)(3), “any report of any kind produced by or for an expert witness . . .” plainly includes the supplemental report. Dr. Margolis and his intern prepared the report to summarize their research of publications on Prozac, research they mentioned but did not detail in their initial report. We cannot see how the supplemental report falls outside the broad parameters set forth in MCR 6.201(A)(3). Given the continuing duty to disclose, the prosecutor was clearly obligated to disclose the supplemental report to defendant.

We disagree with the prosecutor’s assertion that the supplemental report was protected by the work-product privilege. MCR 2.302(B)(3) provides that documents prepared in anticipation of litigation or for trial “by or for another party or another party’s representative” are not discoverable unless the party seeking discovery “has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” The work-product privilege applies to both criminal and civil proceedings. *People v Holtzman*, 234 Mich App 166, 181; 593 NW2d 617 (1999).

Here, the prosecutor’s attempt to characterize the supplemental report as attorney work-product is untenable. Beginning with logic, the prosecutor having turned over to defendant Dr. Margolis’s initial report may hardly be heard to later credibly claim the supplemental report is work product. Turning to law, MCR 6.201(A)(3) specifically requires disclosure of the reports of expert witnesses in criminal cases, so this rule supersedes the general civil procedure rules on work-product and discovery. MCR 6.001(D)(3) (civil procedural rules are not applicable “when a statute or court rule provides a like or different procedure for criminal actions”). In any case, the supplemental report is substantively not the kind of material the work-product rule protects: “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible” materials that attorneys prepare as they “assemble information, sift what [they] consider to be the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strategy.” *Holtzman*, *supra* at 166, quoting *Hickman v Taylor*, 329 US 495; 67 S Ct 385; 91 L Ed 451 (1947). We find that the prosecutor violated MCR 2.601 by failing to disclose the supplemental report to defendant.

In its motion for a new trial, defendant argued that the only adequate remedy for this violation was to exclude Dr. Margolis’s testimony. The prosecutor argued that this remedy was inappropriate because the supplemental report would harm rather than help defendant. The trial court found that defendant was entitled to have the supplemental report in advance of trial, that the prosecutor in withholding the report had acted intentionally, and that the discovery violation had significantly affected defendant’s right to a fair trial.

MCR 6.201(J) provides that if a party fails to comply with a discovery rule, “the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.” When determining the appropriate remedy for a discovery violation, the court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance. *Banks*, *supra* at 252.

Defendant argues that the supplemental report was vital to the defense, because it undermined the prosecution’s attempt to discredit Dr. Breggin’s theory as “junk science” unworthy of serious consideration. The prosecution argues that the report was not exculpatory because it indicated that defendant personally did not suffer from Prozac-induced violence, and

therefore did not have to be disclosed. The prosecution argues it did not assert that Dr. Breggin's theory is "junk science," but only that it did not apply to defendant, and so could not help the defense. We find that we are not comfortable second-guessing what tactical use defense counsel might have made of the report: "Defense counsel must be afforded 'broad discretion' in the handling of cases, which often results in 'taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat.'" *People v. Pickens*, 446 Mich 298, 324; 521 NW2d 797 (1994) (citation omitted).

The prosecution was in possession of a report prepared by a witness it intended to call at trial, and that report was directly related to the core of defendant's argument; defendant could have used it simply to show that Dr. Breggin's theory was corroborated by published research, or, with sufficient time for analysis, might have been able to challenge the report's conclusion that defendant does not fit the profile for Prozac-induced violence. As the trial court noted, because the report was withheld, defendant was not able to question its own expert or the prosecution's expert about it, which affected the weight the jury gave to the expert testimony and reports. The trial court also suggested the defense might have used the information to prepare differently for various critical points, from voir dire of potential jurors, to preparing opening and closing statements, to preparing to examine and cross-examine experts. Certainly, this one report might not have swayed the jury's opinion as to defendant's state of mind, but just as certainly, the defense should have been able to use it to rebut the prosecutor's statements that the Prozac defense is mere "silliness," and that Dr. Breggin is the only person who would testify that it is not. Simply put, the prosecution cannot say that because the report on its face appears to weigh against defendant, defendant could not have made effective use of it at trial.

Our Supreme Court has set a high bar for the abuse of discretion standard: "It [the lower court decision] may not be such a judgment as we would have rendered in determining the facts, but, unless it is clearly against reason and the evidence, or shows that he acted arbitrarily and unreasonably, it cannot be said that it was an abuse of discretion." *Taylor v. Houghton*, 234 Mich 363, 366; 208 NW 438 (1926). And this Court has often stated that "[w]e will find an abuse of discretion only if an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made." *People v. Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989); *People v. Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991); *People v. Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993); *Phillips v. Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995). Given the high level of deference due the trial court's decision, we cannot here say that the trial court abused its discretion in granting defendant a new trial. *Banks, supra* at 252. We cannot say there is no justification for the decision, or that the trial court acted arbitrarily or unreasonably; rather the trial judge, after due consideration of the ruling she had made during the trial, and after having seen the effects of that ruling on defendant, deemed this remedy appropriate. We add that the trial court found the prosecution's conduct in withholding the report was intentional, and we further note that we have heard no valid justification for the prosecutor's failure to disclose the supplemental report. We therefore affirm the trial court's order granting defendant a new trial and remand for further proceedings.

III. Docket No. 255081

Defendant first argues that there was insufficient evidence of premeditation and deliberation presented at trial to support a conviction of first-degree murder. We consider this

issue because, if defendant is correct, constitutional double jeopardy protections would preclude defendant from being retried for first-degree murder. See *People v Jones*, 203 Mich App 74; 512 NW2d 26 (1993).

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). To convict a defendant of first-degree, premeditated murder, the prosecution must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Evidence that the defendant had time to consider his actions is sufficient circumstantial evidence of deliberation and premeditation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Proof of the actor's state of mind can be proven by minimal circumstantial evidence. *Ortiz*, *supra* at 301.

Defendant argues that there was insufficient evidence of deliberation and premeditation, because he acted in the heat of passion. He argues that the evidence establishes voluntary manslaughter or, at the most, second-degree murder. Common-law voluntary manslaughter is defined as an intentional act of killing that is "committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition." *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003). The provocation must be adequate; namely, that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), *aff'd* 461 Mich 992 (2000). Second-degree murder is proved if the evidence establishes that the defendant caused a death with malice and without provocation. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

In this case, the evidence disclosed that defendant was ejected from a bar following an altercation with a patron. He did not return until approximately 45 or 50 minutes later. In the interim, he obtained a loaded gun and an extra clip. He also called his mother and brother to tell them that he planned to "end it." A jury could infer from this evidence that defendant had sufficient time to cool down, and to plan and deliberate his actions. *Herndon*, *supra* at 415; *Kelly*, *supra* at 642. There was sufficient evidence of premeditation and deliberation to support a conviction of first-degree murder.

Defendant also argues that the trial court erred in finding that Drs. Margolis and Norris were qualified to testify as expert witnesses at trial. We consider this issue because it is likely to arise again on retrial.

A trial court's decision to admit or exclude evidence, including expert testimony, is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76-77; 684 NW2d 296 (2004).

MRE 702, governing the admissibility of expert testimony, provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004), our Supreme Court held that MRE 702 imposes a “gatekeeper role” to make certain “that any expert testimony admitted at trial is reliable.” *Id.* (citation omitted); see also *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993) (concluding from similar language in FRE 702 that “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”).

Defendant argues that Drs. Margolis and Norris failed to meet the qualification requirements imposed by MRE 702 because they had no expertise concerning prescription drug side effects or SSRI-induced violence and, were therefore unqualified to rebut the defense that Prozac can induce violent behavior in some persons. Defendant also argues that because neither Dr. Margolis nor Dr. Norris gave any opinion at all on Prozac side effects their testimony was irrelevant. The flaw in defendant’s argument is that the testimony of Drs. Margolis and Norris was not intended to directly address Dr. Breggin’s Prozac theory, but to address defendant’s state of mind or mental capacity. Defendant’s argument pertains more to the relevance of their testimony than to the qualification requirement of MRE 702.

Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich, supra*. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; *Aldrich, supra*. The relevance of the prosecution experts’ testimony hinges on the requirements to establish an involuntary intoxication defense.

In *People v Caulley*, 197 Mich App 177, 188; 494 NW2d 853 (1992), this Court stated that involuntary intoxication by a prescription drug “can constitute a complete defense if the defendant was unexpectedly intoxicated because of the ingestion of a medically prescribed drug.” The Court explained:

In order to establish the intoxication is not voluntary, the defendant must now know or have reason to know that the prescribed drug is likely to have the intoxication effect. . . . Second, the prescribed drug, not another intoxicant, must have caused the defendant’s intoxicated condition. . . . Third, the defendant must establish that as a result of the intoxicated condition, he was rendered temporarily

insane. . . . Consequently, it is necessary to assess the effect of intoxication in conjunction with Michigan’s test for insanity. [*Id.* (citations omitted).]

The operative part of the definition of legal insanity in MCL 768.21a(1) provides that a person who “lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law” may have an affirmative defense to criminal acts.

Dr. Breggin’s Prozac theory was just one component of the defense of legal insanity by involuntary intoxication. Defendant could not prevail on his defense merely by showing that Prozac may have induced him to behave violently. He was also required to show that the prescribed drug, and not other substances, caused his intoxicated state, and that his intoxication rendered him temporarily insane such that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Defendant does not argue that Drs. Margolis and Norris were unqualified to testify on these general aspects of the insanity defense. We briefly note that there is nothing in the record suggesting that Dr. Margolis, a psychiatrist, and Dr. Norris, a psychologist, lack the experience and education to testify as experts on forensic psychiatry or psychology. There is also no basis for concluding that their testimony was not based on sufficient facts; namely, their observations of defendant in the course of evaluating him, or that their testimony was not the product of reliable principles and methods that they reliably applied to the facts of the case. Although defendant argues that they should not have been permitted to testify because they did not actually rebut Dr. Breggin’s Prozac theory, because their testimony was relevant to rebut other essential elements of the insanity defense, the trial court did not abuse its discretion in allowing the testimony.

Defendant finally argues that the trial court erred in rejecting his proposed jury instructions on involuntary intoxication causing insanity. We review jury instructions in their entirety to determine whether there is error requiring reversal. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

The trial court’s instructions were modeled on CJI2d 7.10, involuntary intoxication, and CJI2d 7.11, insanity. Defendant’s proposed instructions incorporated summaries of Dr. Breggin’s theory of how Prozac induces aggressive and violent behavior in some individuals. Relying on *Caulley*, *supra*, defendant argues that the trial court’s instructions were inadequate because they did not adequately explain that involuntary intoxication encompasses a situation where a patient experiences unexpected side effects as a result of voluntarily taking medically prescribed drugs. We disagree. In *Caulley*, this Court held that the then-existing version of CJI2d 7.10 did not fairly explain the defendant’s theory of involuntary intoxication by prescription drugs. But CJI2d 7.10 has since been amended to conform with *Caulley*, so the trial court properly gave the standard instruction instead of defendant’s proposed special instruction. The Court in *Caulley* did not require the trial court to incorporate summaries of an expert witness’s testimony in the instruction; on the contrary, the Court refrained from setting forth specific instructions. *Id.* at 190 n 4.

We do not consider defendant’s remaining issues, which are rendered moot by our decision to affirm the trial court’s order granting defendant a new trial.

We affirm the trial court's order granting defendant a new trial and remand for further proceedings. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey